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SENATE

REPORT
98–388

EXEMPTING ELECTRIC AND TELEPHONE FACILITIES ASSISTED UNDER THE RURAL ELECTRIFICATION ACT FROM CERTAIN RIGHT-OF-WAY RENTAL PAYMENTS UNDER THE FEDERAL LAND POLICY MANAGEMENT ACT OF 1976

APRIL 11 (legislative day, MARCH 26), 1984.—Ordered to be printed

Mr. MCCLURE, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany H.R. 2211]

The Committee on Energy and Natural Resources, to which was referred the act (H.R. 2211) to exempt electric and telephone facilities assisted under the Rural Electrification Act from certain right-of-way rental payments under the Federal Land Policy and Management Act of 1976, having considered the same, reports favorably thereon without amendment and recommends that the act do pass.

PURPOSE

H.R. 2211 as reported would amend section 504(g) of the Federal Land Policy and Management Act (FLPMA) (90 Stat. 2779; 43 U.S.C. 1764) to direct the Secretaries of Agriculture and the Interior to waive the annual rental fee when granting, issuing or renewing rights-of-way on public and National Forest System lands. The exemption would apply only to rights-of-way for electric and telephone facilities that are financed through the Rural Electrification Act, as amended (49 Stat. 1363, as amended; 7 U.S.C. 904, 922). Exempting the annual rental fee would not preclude the Secretaries from requiring reimbursement of reasonable administrative costs incurred in granting, issuing or renewing the right-of-way.

BACKGROUND

In 1936, Congress enacted the Rural Electrification Act (REA) and established an agency to make low-cost loans available to organizations willing to accept the act's obligation of providing area-wide electric service.

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In 1949, the act was extended to provide low interest loans for telephone service on the same basis. As in the case of electricity, it became clear that rural residents would not have access to quality, dependable telephone service unless Federal help was provided. Both the rural telephone and rural electric programs have been extremely successful in achieving the act's goals. In many areas, provision of REA service has required establishing rights-of-way across Federal lands, including both public lands administered by the Bureau of Land Management and national forest lands administered by the U.S. Forest Service. At times, the electric and telephone service also benefits facilities of the Federal Government itself.

For many years, Federal agencies provided rights-of-way at no charge to REA and RTA borrowers. In 1976, the Federal Land Policy and Management Act (FLPMA) was enacted. In general, it requires the payment of a fee for the use of Federal lands, including fees for granting of rights-of-way. Such fees are to be assessed at fair market value. In 1980, regulations were issued to implement FLPMA. These regulations also require the payment of a fee for a right-of-way.

However, both FLPMA and the regulations contain a provision which explicitly grants discretionary authority to the relevant Secretary (Agriculture or Interior) to issue rights-of-way to nonprofit organizations for such lesser (or zero) charge as the Secretary finds equitable and in the public interest.

Despite this provision, special fee considerations have not been granted to rural electric and telephone lines financed under REA. Since 1980, the U.S. Forest Service and the Bureau of Land Management have begun to assess rentals for such REA rights-of-way over Federal lands.

Testimony received during the subcommittee hearing on S. 508 (the Senate companion bill), indicated an apparent absence of uniform implementation of the fee policies, and that wide variances apparently exist concerning fee amounts, percentage of fair market value charged, and generally the basis on which the fees are assessed. H.R. 2211, as reported, will establish a uniform fee for those rights-of-way covered in this act.

Legislative History

H.R. 2211 passed the House of Representatives on November 8, 1983. S. 508, a companion bill, was introduced on February 14, 1983. A hearing before the Public Lands and Reserved Water Subcommittee was held on S. 508 on June 27, 1983. The administration opposes the enactment of H.R. 2211 as passed the House and S. 508. In an open business meeting on April 4, 1984, the Energy and Natural Resources Committee ordered H.R. 2211 favorably reported without amendment.

Committee Recommendation and Tabulation of Votes

The Senate Committee on Energy and Natural Resources in open business session on April 4, 1984, by a majority vote of a quorum present, recommends that the Senate pass H.R. 2211 without amendment.

The rollcall vote on reporting the measure was 15 yeas, 2 nays, as follows:

YEAS	NAYS
Mr. McClure	Mr. Metzenbaum [1]
Mr. Hatfield [1]	Mr. Bradley
Mr. Domenici [1]	
Mr. Wallop	
Mr. Warner	
Mr. Murkowski	
Mr. Nickles	
Mr. Hecht	
Mr. Chafee	
Mr. Heinz [1]	
Mr. Evans	
Mr. Johnston	
Mr. Ford	
Mr. Matsunaga [1]	
Mr. Melcher	

[1] Indicates voted by proxy.

Section-by-Section Analysis

As reported, the bill is in a single section which amends section 504 (g) of the Federal Lands Policy and Management Act of 1976 so as to prohibit the imposition of rental fees for rights-of-way across Federal lands for facilities (or extensions thereof) financed under the Rural Electrification Act. Administrative costs associated with issuance of rights-of-ways can still be charged to the entities receiving such rights-of-ways.

Cost and Budgetary Considerations

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., April 9, 1984.

Hon. James A. McClure,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for H.R. 2211, a bill to exempt electric and telephone facilities assisted under the Rural Electrification Act from certain right-of-way rental payments under the Federal Land Policy and Management Act of 1976.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Rudolph G. Penner, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

APRIL 9, 1984.

1. Bill number: H.R. 2211.

2. Bill title: A bill to exempt electric and telephone facilities assisted under the Rural Electrification Act from certain right-of-way rental payments under the Federal Land Policy and Management Act of 1976.

3. Bill status: As ordered reported by the Senate Committee on Energy and Natural Resources, April 4, 1984.

4. Bill purpose: This bill stipulates that rights-of-way through public lands or National Forest System lands shall be granted, issued or renewed without rental fees for electric or telephone facilities financed under the Rural Electrification Act of 1936, or for any extensions from such facilities.

5. Estimated cost to the Federal Government: This bill will result in a loss of receipts to the Federal Government, which will be reflected as an increase in both budget authority and outlays in the amounts shown in the following table.

	Millions
Estimated budget authority:	
Fiscal year:	
1984	$0.8
1985	1.0
1986	1.1
1987	1.2
1988	1.2
Estimated outlays:	
Fiscal year:	
1984	.8
1985	1.0
1986	1.1
1987	1.2
1988	1.2

The impact of this bill falls within budget functions 300 and 850.

Basis of estimate: For the purpose of this estimate, it is assumed that this bill will be enacted by June 1984.

The estimate of lost receipts to the Federal Government for fiscal year 1984 was based on receipts realized from rights-of-way rental fees collected from affected facilities by the Bureau of Land Management (BLM) and the National Forest Service (NFS) in fiscal years 1982 and 1983. However, the NFS is presently implementing a rate modification. As a result, the budget impact projected in later years was adjusted to reflect increased rental fees.

Twenty-five percent of NFS receipts are paid to states as a permanent appropriation. Thus, the loss of federal receipts is partially offset by reduced payments to states, as shown in the following table.

[By fiscal years, in millions of dollars]

	1984	1985	1986	1987	1988
Receipts lost	0.9	1.2	1.4	1.5	1.5
Less: Reduced payments to States	.1	.2	.3	.3	.3
Net loss to Federal Government	.8	1.0	1.1	1.2	1.2

6. Estimated cost to State and local governments: The States receive 25 percent of rights-of-way fees collected by the National Forest Service. The following table shows the budget impact on State governments expected to result from the reduction in Federal receipts.

Estimated loss to States: Fiscal year:	*Millions*
1984	$0.1
1985	.2
1986	.3
1987	.3
1988	.3

7. Estimate comparison: None.

8. Previous CBO estimate: On November 2, 1983, a CBO estimate was prepared for an identical bill, ordered reported by the House Committee on Interior and Insular Affairs, October 26, 1983.

9. Estimate prepared by: Debbie Goldberg.

10. Estimate approved by: C. G. Nuckols (For James L. Blum, Assistant Director for Budget Analysis).

Regulatory Impact Evaluation

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes the following evaluation of the regulatory impact which would be incurred carrying out H.R. 2211.

The act is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses. No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any additional paperwork would result from the enactment of H.R. 2211.

Executive Communications

The pertinent legislative reports and communications received by the Committee from the Department of Agriculture and the Department of the Interior setting forth Executive Agency recommendations relating to H.R. 2211 are set forth below:

Department of Agriculture,
Office of the Secretary,
Washington, D.C., March 21, 1984.

Hon. James A. McClure,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: As you requested, here are our views on H.R. 2211, an act "To exempt electric and telephone facilities assisted under the Rural Electrification Act from certain right-of-way rental payments under the Federal Land Policy and Management Act of 1976."

The Department of Agriculture opposes enactment of H.R. 2211.

H.R. 2211 would amend section 504(g) of the Federal Land Policy and Management Act (FLPMA) (90 Stat. 2779; 43 U.S.C. 1764) to permit the Secretaries of Agriculture and the Interior to waive the

annual rental fee when granting, issuing or renewing rights-of-way on public and National Forest System lands. The exemption would apply only to rights-of-way for electric and telephone facilities that are financed through the Rural Electrification Act, as amended (49 Stat. 1363, as amended; 7 U.S.C. 904, 922). Exempting the annual rental fee would not preclude the Secretaries from requiring reimbursement of reasonable administrative costs incurred in granting, issuing or renewing the right-of-way.

Section 504(g) of FLPMA requires that the ". . . holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way. . . ." This subsection also provides discretionary authority to the Secretaries to waive part or all of the annual fees of Federal, State, or local government agencies, or of nonprofit associations and corporations, or of other holders who provide a valuable benefit to the public or to the programs of the Department concerned. Regulations implementing these provisions were jointly developed by the two Departments and are consistently applied to National Forest System and public lands.

It is the policy of this Department to charge fees for rights-of-way across National Forest System land, including those held by rural electric and telephone cooperatives. Our regulations (36 CFR 251.57) permit waiving the fee under certain limited conditions. For example, if a right-of-way exclusively serves a Federal facility, a fee is not charged. Fees may also be waived for facilities that contribute to the management of the National Forest or other Federal lands, such as an electrical line to wildlife or fishery improvements. The regulations prohibit, however, waiving the fee when funds derived by the holder through use of the right-of-way are used to increase the value of the authorized improvements owned by the holder, or are used to support other activities of the holder.

There are about 43,000 miles of right-of-way for electric and telephone lines under permit on National Forest System lands of which about one-third are to cooperatives. Thi sinvolves 3,271 powerline permits and 1,496 telephone line permits. In 1983, rural electric and telephone cooperatives paid nearly $600,000 to the Federal Government for use of rights-of-way.

In a USDA policy originating in 1938, rural electric and telephone cooperatives which were borrowers under the Rural Electrification Act were granted free use of rights-of-way. This policy had as its objective the development of rural areas. However, as a result of the fees and charges provisions of the Independent Offices Appropriation Act of 1952, and subsequent actions, policies which granted free use have been gradually tightened. A USDA policy to require REA borrowers to pay fees was adopted about 1974. The Forest Service, in consultation with the Rural Electrification Administration (REA), concluded that, as a matter of equity, free use could no longer be justified when the holder of the right-of-way was engaged in a similar business and followed practices comparable to private commercial enterprise. Failure to charge an appropriate fee provided a subsidy to the holder of the right-of-way. The fee program was not implemented, however, because congressional consideration was initiated shortly

thereafter of legislation that lead to the passage of FLPMA in 1976. The USDA policy was supported and expanded by the passage of FLPMA. Collection of fees began in 1980 upon the adoption of final regulations implementing section 504.

In promulgating regulations to implement section 504, the two Departments received valuable discussion and in-depth analysis from the public comments. They provided a clearer understanding of the issue of charging rural electric and telephone cooperatives rental fees for use of Federal lands. Although these cooperatives serve mostly rural customers, many are routinely involved in commercial practices similar to investor-owned utilities, which may also serve rural customers. As a matter of policy, allowing free-use of Federal lands to these cooperatives while charging privately-owned utilities for similar use would not be equitable, particularly when both entities have customer charges as their principal source of revenue.

An appraisal is made in determining the fee for rights-of-way over Federal lands. The market evidence used in these appraisals is typically derived from a wide market area that includes both cooperatives and investor-owned utilities. The fee varies according to the amount and value of the land under permit. Fees for most right-of-way permits for cooperatives are less than $1,000 per year. We believe that the impact of these fees on cooperative customers is slight. For example, the fees paid by nine electric distribution cooperatives with permitted right-of-way on National Forest land in Montana are about $0.08 per year for each of the nearly 64,000 metered customers. The range of fees is from $0.01 to $0.45 per customer per year. Eight cooperatives in Missouri pay fees that amount to about $0.05 per year for each of the 121,435 metered customers. Although there are instances where the impact is greater, the fees charged are generally comparable to the fees charged investor-owned utilities.

Rural electric cooperatives generally have a policy requiring members to give, at no charge, distribution lines rights-of-way across their property. However, some cooperatives now pay landowners for rights-of-way that provide power to commercial entities such as oil and gas wells or sawmills. Corporate landowners often insist upon payment for rights-of-way. Timber companies in the northern Rocky Mountain region and in the South are charging for rights-of-way across their lands. We find that such landowners require payment in instances where they perceive no benefit from the rights-of-way. If there is a benefit, there will likely be no charge for the use of the land. This is essentially the same approach used by the Department of Agriculture.

We must also point out that not all borrowers of Federal funds under the Rural Electrification Act are rural electric and telephone cooperatives. Loans insured or guaranteed by REA also are available to investor-owned utilities, public utilities and utilities owned by local governments. Although most loans now made by REA are made to cooperatives, some are also made to rural telephone companies. These companies would qualify, under the provisions of H.R. 2211, to have right-of-way rental fees waived, where other companies not having an REA loan would not qualify.

Thus, we believe that requiring a modest payment by cooperatives for use of Federal lands is both appropriate and equitable. The policy

set forth by Congress in the Federal Land Policy and Management Act providing for payment of annual use fees is sound and should not be changed.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

JOHN R. BLOCK, *Secretary.*

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., April 9, 1984.

Hon. JAMES A. MCCLURE,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for our views on H.R. 2211, an Act "To exempt electric and telephone facilities assisted under the Rural Electrification Act from certain right-of-way rental payments under the Federal Land Policy and Management Act of 1976."

We oppose enactment of the House-passed version of H.R. 2211.

H.R. 2211, as passed by the House of Representatives, would amend section 504(g) of the Federal Land Policy and Management Act of 1976 to exempt electric and telephone facilities or extensions thereof, financed under the Rural Electrification Act of 1936, from paying rental fees for rights-of-way across Federal lands.

The question of the exemption that would be authorized by this bill has been given serious consideration on many occasions. In response to requests for public comments during the development of the rights-of-way regulations issued by the Secretary of the Interior and the special use permit regulations issued by the Secretary of Agriculture, many of the comments requested that the regulations provide for free use for particular kinds of use and for certain types of organizations. Exemption from the requirements to pay for rights-of-way was specifically requested by rural telephone cooperatives and rural electric cooperatives.

After careful and thorough consideration of the comments we concluded that there is no equitable basis for granting rural electric or telephone cooperatives free access and use of the public lands, especially when regulated private utilities and their customers are treated differently.

The use of public lands and National Forest System lands for commercial purposes should be on the same terms and conditions as similar use of private lands. Allowing free use of Federal lands to some users who serve commercial purposes while charging others, such as investor-owned utilities which also serve rural areas, for similar use would be patently unfair.

The fees for use of the Federal lands are the appraised fair market rental value of the property and are not excessive. All taxpayers, whether they are customers or noncustomers, share in the cost of managing the Federal lands. The provisions for payment of annual use

fees contained in FLPMA simply provide that those persons or organizations receiving a special benefit from the Federal lands pay for that special benefit rather than requiring that persons who do not receive the special benefit pay for it. For this reason, when the regulation covering rights-of-way was published, it was determined that cooperatives and municipal utilities, whose principal source of revenue is customer charges, will be required to pay the fees. We believe that policy is sound and do not believe it should be negated by legislation.

In testimony presented on June 14, 1983, on H.R. 2211 as introduced, before the House Interior Subcommittee on Public Lands and National Parks, we expressed our concerns with the legislation. The House-passed version of H.R. 2211 addresses some of those concerns, specifically that of the waiver of reimbursement for administrative and other costs incurred in processing right-of-way applications. However, we continue to believe that there is no equitable basis for granting rural electric or telephone cooperatives free access and use of the public lands.

Moreover, H.R. 2211 has another serious defect. The Rural Electrification Act of 1936 allows financial assistance to private corporations and private individuals which provide rural electrification. If a private corporation or private individual has received financial assistance under the Rural Electrification Act of 1936, this legislation would exempt such entities from rights-of-way rental charges. We are strongly opposed to granting exemption to private entities.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

GARRY E. CARRUTHERS,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, H.R. 2211, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

(90 STAT. 2778, 43 U.S.C. 1764)

* * * * * * *

GENERAL PROVISIONS

SEC. 504. (a) The Secretary concerned shall specify the boundaries of each right-of-way as precisely as is practical. Each right-of-way shall be limited to the ground which the Secretary concerned determines (1) will be occupied by facilities which constitute the project for which the right-of-way is granted, issued, or renewed, (2) to be necessary for the operation or maintenance of the project, (3) to be necessary to protect the public safety, and (4) will do no unnecessary

damage to the environment. The Secretary concerned may authorize the temporary use of such additional lands as he determines to be reasonably necessary for the construction, operation, maintenance, or termination of the project or a portion thereof, or for access thereto.

(b) Each right-of-way or permit granted, issued, or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project. In determining the duration of a right-of-way the Secretary concerned shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The right-of-way shall specify whether it is or is not renewable and the terms and conditions applicable to the renewal.

(c) Rights-of-way shall be granted, issued, or renewed pursuant to this title under such regulations or stipulations, consistent with the provisions of this title or any other applicable law, and shall also be subject to such terms and conditions as the Secretary concerned may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination.

(d) The Secretary concerned prior to granting or issuing a right-of-way pursuant to this title for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way which shall comply with stipulations or with regulations issued by that Secretary, including the terms and conditions required under section 505 of this Act.

(e) The Secretary concerned shall issue regulations with respect to the terms and conditions that will be included in rights-of-way pursuant to section 505 of this title. Such regulations shall be regularly revised as needed. Such regulations shall be applicable to every right-of-way granted or issued pursuant to this title and to any subsequent renewal thereof, and may be applicable to rights-of-way not granted or issued, but renewed pursuant to this title.

(f) Mineral and vegetative materials, including timber, within or without a right-of-way, may be used or disposed of in connection with construction or other purposes only if authorization to remove or use such materials has been obtained pursuant to applicable laws.

(g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: *Provided*, That when the annual rental is less than $100, the Secretary concerned may require advance payment for more than one year at a time: *Provided further*, That the Secretary concerned may waive rentals where a right-of-way is granted, issued, or renewed in reciprocation for a right-of-way conveyed to the United States in connection with a cooperative cost share program between the United States and the holder. The Secretary concerned may, by regulation or prior to promulgation of such regulation, as a condition of a right-of-way, require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspection and monitoring of construction, operation, and termination of the facility pursuant to such right-of-way: *Provided, however*,

That the Secretary concerned need not secure reimbursement in any situation where there is in existence a cooperative cost share right-of-way program between the United States and the holder of a right-of-way. Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest. Such rights-of-way issued at less than fair market value are not assignable except with the approval of the Secretary issuing the right-of-way. The moneys received for reimbursement of reasonable costs shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. *Rights-of-way shall be granted, issued, or renewed, without rental fees, for electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936, as amended, or any extensions from such facilities: Provided, That nothing in this sentence shall be construed or affect the authority of the Secretary granting, issuing, or renewing the right-of-way to require reimbursement of reasonable administrative and other costs pursuant to the second sentence of this subsection.*

(h) (1) The Secretary concerned shall promulgate regulations specifying the extent to which holders of rights-of-way under this title shall be liable to the United States for damage or injury incurred by the United States caused by the use and occupancy of the rights-of-way. The regulations shall also specify the extent to which such holders shall indemnify or hold harmless the United States for liabilities, damage, or claims caused by their use and occupancy of the rights-of-way.

(2) Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

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